United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

°75-7673

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

B
P/S

MARION AITCHISON, individually and on behalf of MICHAEL AITCHISON, and JANICE AITCHISON, her children, and on behalf of all other persons similarly situated,

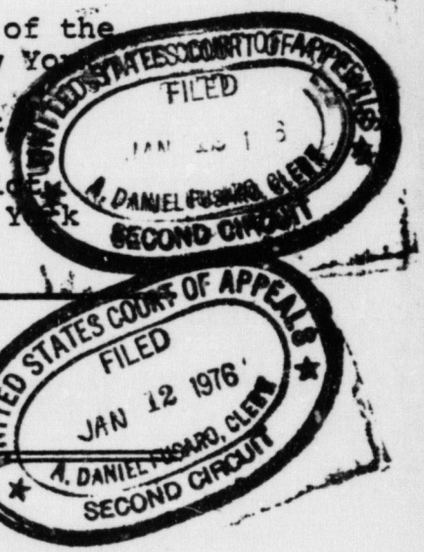
Plaintiffs-Appellees,

-against-

STEPHEN BERGER, individually and as Commissioner of the Department of Social Services of the State of New York,

Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of New York



BRIEF FOR DEFENDANT-APPELLANT

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BRIEF FOR DEFENDANT-APPELLANT

Preliminary Statement

Defendant-appellant Stephen Berger, Commissioner of the New York State Department of Social Services (hereinafter "defendant"), appeals from an Order and Judgment of the United States District Court for the Southern District of New York (per Frankel, D.J.), dated December 3, 1975, which declared invalid and enjoined New York Social Services Law

§ 366(2)(a)(8) and 18 Codes, Rules and Regulations §§ 360.5(e) and 360.7(a)(5) as applied to medical assistance recipients who retain less monthly exempt income than is paid to categorical (AFDC) public assistance families of the same size, living in the same social services district and incurring the same costs for shelter and fuel (A. 290-292).* The state statute and regulation were found inconsistent with a federal implementing regulation, 45 C.F.R. § 248.3(c)(1)(ii), to the extent above described, and the federal regulation was in turn declared consistent with the 42 U.S.C. §§ 1396a(a)(17) and 1396a(a)(10)(C)(i) (A. 291). The action was declared a class action, and defendants** were allowed 25 days to determine which recipients were class members, i.e., those whose exempt income allegedly fell below the AFDC 'standard of need,' and to recompute their exempt income in conformity with the Order and Judgment (A. 290, 291).***

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* References prefixed by the letter "A" refer to the Appendix filed with this Court.

** Noah Weinberg, Commissioner of the Rockland County Department of Social Services was named as defendant below (A. 5) but has not appealed.

*** The 25 day recomputation period was extended to 75 days by Stipulation and Order (A. 295-297) after the entry of the Order and Judgment. Accordingly, the defendant does not pursue his appeal from that portion of the Order and Judgment (A. 293-294).

Questions Presented

1. Whether New York's adoption of uniform levels of exempt income for medical assistance recipients which include an averaged shelter component and its adoption of variable shelter allowances for AFDC recipients present a substantial question under the Equal Protection Clause with respect to those medical assistance recipients whose shelter cost exceeds the averaged component but is less than or equal to the AFDC maximum for families of the same size living in the same social services district?

2. Whether the State's adoption of uniform levels of exempt income for medical assistance recipients which include an averaged shelter component and its adoption of variable shelter allowances for AFDC recipients which result in some medical assistance families retaining less exempt income than they would be paid if they were in fact AFDC recipients violates 45 C.F.R. § 248.3(c)(1)(ii) which generally requires that levels of income for medical assistance recipients be expressed "in total dollar amounts" at the "higher of the levels of the payments standards generally used" in categorical assistance programs?

3. If 45 C.F.R. § 248.3(c)(1)(ii) is construed as requiring the use of variable shelter allowances as opposed to allowing averaged shelter cost, does that regulation exceed federal statutory requirements which require reasonable standards of determining medical assistance eligibility and comparability between recipients of such assistance and recipients of both public assistance and medical assistance?

Statutes and Regulations Involved

State Statute

New York Social Services Law § 366, as amended by chapters 480 and 481 of the Laws of 1975, states in part:

> Eligibility
>
> * * *
>
> 2. (a) The following income and resources shall be exempt and shall neither be taken into consideration nor required to be applied toward the payment or part payment of the cost of medical care and services available under this title; provided, however, that such income may be required to be applied toward the enrollment fee, as required by subdivision five of section three hundred sixty-seven-a of this title.
>
> * * *

(8) (i) Income in an amount set forth in the following schedules:
Annual net income - Number of family members in a household and family members for whom they are legally responsible or have assumed responsibility.

One	Two	Three	Four	Five	Six	Seven
$2,700	$3,800	$4,000	$5,000	$5,700	$6,400	$7,200 [*]

Such income exemption shall be increased by six hundred dollars for each member of a family household in excess of seven.
(ii) on and after October first, nineteen hundred seventy-five, income in an amount set forth in the following schedule:
Annual net income - Number of family members in a household and family members for whom they are legally responsible or have assumed responsibility.

One	Two	Three	Four	Five	Six	Seven
$2,700	$3,800	$4,200	$5,000	$5,800	$6,500	$7,400

Such income exemptions shall be increased by seven hundred dollars for each member of a family household in excess of seven.

State Regulations

18 Codes, Rules and Regulations § 360.5, as promulgated on October 31, 1975, states in part:

Determination of net available income and utilization of any excess

* * *

[*] This schedule was effective July 1, 1975.

(e) If an applicant or recipient is receiving chronic care in a medial institution, or intermediate care facility, all resources in excess of those exempt from consideration in accordance with paragraph (a) of subdivision 2 of section 366 of the Social Services Law and $28.50 per month for personal expenses shall be utilized to meet the cost of medical assistance for such applicant or recipient and the other members of his former family household. For the purpose of this subdivision and subparagraph (8) of paragraph (a) of subdivision 2 of section 366 of the Social Services Law, when a person is in chronic care, he shall not be deemed to be a member of any household except he shall be considered a member of his former family household for the purpose of determining the amount of the savings exemption for such family household. The income of such applicant or recipient shall be utilized in the following order:

(1) to meet the maintenance needs of the dependent members of his former family household, less any amount of income in cash or in kind possessed by such dependent members, in accordance with the following schedules:

Numbers of Family Members in Household Dependent on Income

One	Two	Three	Four	Five	Six	Seven
$2,700*	$3,800*	$4,200**	$5,000	$5,800**	$6,500**	$7,400**

For each additional person in excess of seven in the household, add $700.00.

(2) the balance, if any, to meet the cost of his medical assistance.

* Effective July 1, 1975
** Effective October 1, 1975

18 Codes, Rules and Regulations § 360.7 states in part:

Legally responsible relatives living apart from dependent relatives [*]

The ability of a spouse living apart from dependent relatives to contribute toward the cost of care of his or her spouse and of a parent living apart from dependent relatives to contribute toward the cost of care of his dependent child shall be ascertained as follows:

(a) The following income and resources shall be exempt and shall constitute a reserve for the legally responsible relative and members of his family household:

(1) a homestead which is essential and appropriate to the needs of the household;

(2) essential personal property;

(3) liquid resources in the amount of $500 for each member of the family household but not in excess of $2000 per family as a burial reserve;

(4) savings in amounts equal to at least one-half of the appropriate income reserve; and

(5) income in an amount set forth in the following schedule:

ANNUAL NET INCOME - MINIMUM RESERVE FOR MAINTAINING OF FAMILY HOUSEHOLD OF LEGALLY RESPONSIBLE RELATIVES LIVING APART FROM APPLICANT OR RECIPIENT

Number of Family Members in Household Dependent on Income

One	Two	Three	Four	Five	Six	Seven
$2,500	$3,400	$4,000	$5,000	$5,700	$6,400	$7,200

[*] This section is currently being revised to conform with NYSSL § 366(2)(a)(8), as amended by chapters 480 and 481 of the Laws of 1975.

Such minimum reserve shall be increased by $600 for each member of a family household in excess of seven, who is dependent upon the income of such members.

Federal Statute

42 U.S.C. § 1396a states in part:

(a) A State plan for medical assistance must --

* * *

(10) provide --

* * *

(C) if medical assistance is included for any group of individuals who are not described in clause (A) [describing individuals receiving categorical public assistance] and who do not meet the income and resources requirements of the appropriate State plan, or the supplemental security income program under subchapter XVI of this chapter, as the case may be, as determined in accordance with standards prescribed by the Secretary --

(i) for making medical assistance available to all individuals who would, except for income and resources, be eligible for aid or assistance under any such State plan or to have paid with respect to them supplemental security income benefits under subchapter XVI of this chapter, and who have insufficient (as determined in accordance with comparable standards) income and resources to meet the costs of necessary medical and remedial care and services, and

(ii) that the medical assistance made available to all individuals not described in clause (A) shall be equal in amount, duration, and scope;

* * *

(17) include reasonable standards (which shall be comparable for all groups and may, in accordance with standards prescribed by the Secretary, differ with respect to income levels, but only in the case of applicants or recipients of assistance under the plan who are not receiving aid or assistance under any plan of the State approved under subchapter I, X, XIV, or XVI, or part A of subchapter IV of this chapter, and with respect to whom supplemental security income benefits are not being paid under subchapter XVI of this chapter based on the variations between shelter costs in urban areas and in rural areas) for determining eligibility for and the extent of medical assistance under the plan which (A) are consistent with the objectives of this subchapter,* * * *

* * *

Federal Regulation

45 C.F.R. § 248.3 (1974 ed) states in part:

(c) With respect to the medically needy, the State plan must:

(1) Provide levels of income and resources for maintenance, in total dollar amounts, as a basis for establishing financial eligibility for medical assistance. Under this requirement:

(i) Such income levels must be comparable as among individuals and families of varying sizes;

(ii) Except as specified in paragraph (c)(1)(iii) of this section, the income levels for maintenance must be, as a minimum, at the higher of the levels of the payment standards generally used as a measure of financial eligibility in the money payment programs, that is:

(A) In the case of families of three or more, at the level of the payment standard of the State plan approved under title IV-A generally applied;

(B) In the case of individuals, or families (including families with children) of two persons, at the higher of:

(1) The payment standard of the State plan approved under title IV-A generally applied, or

(2) The highest level of payment which is generaly available to individuals in any of the three groups (aged, blind and disabled) who are (or would be, except for income) eligible for benefits under title XIX;

except that this subparagraph (B) shall not be construed to require the provision of medical assistance to any aged, blind or disabled individual who would not be eligibile under the medical assistance standard in effect in such State for January, 1972.

Statement of the Case

A. Comparison of exempt income levels under the medical assistance program with the AFDC 'standard of need'.

In 1965, Congress enacted legislation to provide grants to the states for medical assistance. 42 U.S.C. § 1396 et seq., added July 30, 1965. Like categorical public assistance* medical assistance is an example of "co-operative federalism". King v. Smith, 392 U.S. 309, 316 (1968). A state may participate in the medical assistance program under an approved state plan (42 U.S.C. § 1396a) and obtain a federal grant, or share, in varying percentages of the total cost of allowed items and services (42 U.S.C. §§ 1396, 1396b). The state plan must include categorically needy (AFDC and SSI recipients) and at the option of the State, may also include the "medically needy", 42 U.S.C. §§ 1396a(a)(10)(A)(B)(C), 1396d(a).** The

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* There are two remaining categorical assistance programs: Aid to Families with Dependent Children (AFDC), 42 U.S.C. § 601 et seq, and Supplemental Security Income (SSI), 42 U.S.C. § 1381 et seq.

** "Medically needy" individuals are those whose income and resources exceed eligibility requirements of categorical assistance but which are inadequate to meet the costs of necessary medical and remedial care. 42 U.S.C. §§ 1396a (a)(10)(A)(B)(C), 1396d(a). 45 C.F.R. § 248.1(a). Such individuals must meet all other eligibility requirements for categorical assistance, i.e., they must be 'federally-related'.

state plan must of course conform with federal statutory requirements, 42 U.S.C. § 1396a, and with authorized federal implementing regulations. See generally Catholic Medical Center of Brooklyn and Queens, Inc. v. Rockefeller, 305 F. Supp. 1256, 1258, 1264-1265 (E.D.N.Y. 1969), vac. 397 U.S. 20, affd. 430 F. 2d 1297 (2d Cir.), affd. 400 U.S. 931 (1970).

Insofar as pertinent, federal statutes require that the medical assistance available to any categorically eligible individual be "no less in amount, duration or scope" than that available to any other such individual and no "less, etc." than that available to the medically needy. 42 U.S.C. § 1396a(a)(10)(A)(B)(i)(ii). Medically needy individuals are entitled to have their eligibility determined in accordance with standards "comparable" to those employed in determining eligibility for categorical public assistance. 42 U.S.C. § 1396a(a)(10)(C)(i). Medical assistance available to the medically needy must be "equal in amount, duration and scope" within that group. 42 U.S.C. § 1396a(a)(10)(C)(ii). There is no requirement that the medical assistance available to the medically needy be identical with or equal to that available to the categorically eligible.*

* Categorical eligibility for medical assistance and the individuals included in that class are sometimes referred to in the text as "public assistance-medical assistance", or "PA-MA". Eligibility based on medical need and the individuals included in that class are sometimes referred to in the text as "medical assistance only" or "MA-only".

The states must establish "reasonable standards" "comparable for all groups" for determining eligibility and the amount of aid. 42 U.S.C. § 1396a(a)(17).

With respect to the medically needy (MA-only), the federal implementing regulation [45 C.F.R. 248.3(c)] requires that in determining eligibility, the State plan "[p]rovide levels of income....in total dollar amounts" [subd. (c)(1)]. The "income levels must be at the higher of the payments standards generally used as a measure of financial eligibility" in categorical assistance programs [subd. (c)(1)(i)].* "Higher....payments standards" is further defined as the "level" of the AFDC "payment standard" for families of three or more [subd. (c)(1)(ii)(A)] and the higher of the AFDC "payment standard" or the "highest [SSI] level of payment....generally available" for individuals and families of two [subd. (c)(1)(ii)(B)]. The relevant regulatory history of § 248.3(c)(1) states that "medically needy levels must be uniform among individuals and families of similar size" and that the levels are to be tied to the "higher payment standard generally available" in categorical assistance programs. 39 Fed. Reg. 9513 (March 11, 1974).

* The regulation was formerly numbered 248.21(3) and provided insofar as pertinent that "income levels for maintenance" be "at the levels of the most liberal [rather than higher]" categorical assistance program [former subd. (3)(i)(b), 1973 ed.]. Section 248.21 was adopted effective January 28, 1969, 34 Fed. Reg. 1320. The present form of the regulation, § 248.3(c), was adopted effective March 11, 1974, 39 Fed. Reg. 9512.

Since medical assistance eligibility exempts income paid "for medical care or for any other type of remedial care recognized under State law" [42 U.S.C. 1396a(a)(17)], the eligibility income level determined under 45 C.F.R. § 248.3(c) is also the exempt income level (or "spend down" limit) for recipients. I.e., an applicant's current personal income must be paid for medical and remedial care until the exempt income level is reached. Once reached, the cost of care, or remaining balance, is paid by the medical assistance program.

Effective April 30, 1966, New York State elected to participate in the medical assistance program. New York Social Services Law ("NYSSL") § 363 et seq., added by C. 256 § 3 of the Laws of 1966. From the outset, the New York plan has included both the categorically eligible (PA-MA) and the medically needy (MA-only). NYSSL § 366(1).* Categorically eligible individuals receive public assistance benefits computed under applicable program requirements plus allowed medical and

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* NYSSL § 366(1)(a) also provides medical assistance for Home Relief eligibles and recipients. Home Relief is not a federal categorical assistance program, and thus no individual who would be eligible for Home Relief (and no other federal program) except for his income and resources can be 'federally-related' for purposes of participation in the federal medical assistance program. The medical assistance income eligibility levels for 'Home Relief-Related' individuals are set forth in New York Code Rules and Regulations ("NYCRR") § 360.3, not NYSSL § 366(2)(a)(8). Only § 366(2)(a)(8) levels are involved in the instant appeal.

remedial items and services. AFDC eligibility and benefits paid are measured principally in terms of "flat grants" for food, clothing and incidentals which vary according to assistance group size plus shelter allowances equal to the actual cost of rent up to the appropriate maximum which varies according to assistance group size and social services district. NYSSL § 131-a(2)(3); 18 NYCRR § 352.3(a).* SSI consists of a flat grant for all (non-medical) needs. Amounts vary according to living arrangements and assistance group size. 42 U.S.C. § 1381 et seq.; NYSSL § 207 et seq.

For the medically needy (MA-only), NYSSL § 366(2)(a) and related regulations 18 NYCRR §§ 360.5(e) and 360.7(a) provide for the exemption of certain resources, allowances and income, including scheduled annual (net) exempt income by

* The correct maximum monthly shelter allowances for rent in all social services districts in the state, effective October 1, 1975, appear at pp. 210-213 of the Appendix. Fuel is separately calculated where appropriate. NYSSL § 131-a(2); 18 NYCRR § 352.5; Fuel schedules, effective October 1, 1975, appear at pp. 224-230 of the Appendix.

family size [subd. (2)(a)(8)].* The schedule, updated from time to time, was established, inter alia, to implement 42 U.S.C. §§ 1396a(a)(10)(C), 1396a(a)(17) and 45 C.F.R. § 248.3(c)(1). It sets forth uniform exempt income levels expressed in "total dollar amounts" at the "level" of the AFDC "payment standard" for families of three or more and at the "highest [SSI] level of payment....generally available" for individuals and families of two since that level is higher than the AFDC payment standard for those categories. See 45 C.F.R. § 248.3(c). The NYSSL § 366(2)(a)(8) exempt income levels for families of three or more are the NYSSL § 131-a(3) AFDC "flat grant" for basic needs for the appropriate family size and the average, or "mean," shelter cost paid by AFDC families of the same size rounded up to the nearest hundred (A. 88-89, 139-140, 262-263).** For individuals and families of two, the

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* The state regulations generally track NYSSL § 366(2)(a) and do not present any separate issue on this appeal. They are not considered further herein unless expressly referred to in the text.

** In the event defendant prevails on this appeal, plaintiffs-appellees ("plaintiffs") intend to challenge the accuracy of the AFDC shelter cost averaging on the remand of the case to the district court (A. 270, 283 n. 32).

the NYSSL § 366(2)(a)(8) except income level is the SSI payment for same size assistance group. (A. 88-91, 139-140, 262-263, 278 n. 10).

From the outset of its participation in the medical assistance program, New York has averaged the shelter cost of AFDC recipients to reach the exempt income levels required by the program as set forth in NYSSL § 366(2)(a)(8). The New York State Medical Assistance Plan, incorporating exempt income levels determined in the manner set forth above, was initially approved by the HEW Region II Commissioner on April 1, 1970 (A. 87, 93-100, 101-102). On December 31, 1974, following the adoption of 45 C.F.R. § 248.3(c) (to replace § 248.21), the HEW Region II Commissioner again approved the State plan as complying, inter alia, with that regulation (A. 88-89, 103-109, 110). HEW's only comment with respect to compliance with § 248.3(c)(1), other than the approvals just cited, concerned compliance with subdivision (B)(2). As noted, § 248.3(c)(1)(ii)(B) authorizes the adoption of the higher of the AFDC payment standard [(B)(1)] or "highest level of [SSI] payment generally available [(B)(2)] for individuals and families of two, and New York has adopted the SSI [(B)(2)] level. The HEW Compliance Report for the quarter

ending March 31, 1975 refers specifically to 45 C.F.R § 248.3(c)(1)(ii)(B)(2) [emphasis added] and states: "Due to a series of factors, the cash assistance standards have become more liberal than the MA standards for most family sizes" (A 38). NYSDSS understood the comment to refer to an updating of the NYSSL § 366(2)(a)(8) levels, particularly those for individuals and two person families since the reference was to subdivision (B)(2) (A. 90-91). The levels for one and two person households (and for other family sizes) were in fact updated after the HEW comment by chapters 480, § 1 and 481, § 3 of the Laws of 1975 to produce the schedule currently in force. See pp. 5 ante.* NYSDSS has not received further comment from HEW on this point. In no event, is it appropriate to construe HEW's general comment of March 1975 as challenge to the choice of an averaged rather than an individualized and variable shelter component in establishing the NYSSL § 366(2)(a)(8) levels.**

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* Upward adjustments for one and two person households were effective July 1, 1975.

** The district court does not appear to rely on the HEW comment in support of its view that the "averaging methadology" was out of compliance (A. 273, 284 n. 38). However, it fails to note that the NYSSL § 366(2)(a)(8) levels were in fact updated following the comment (A. 284 n. 38).

In terms of HEW practice, defendant's averaging of the AFDC shelter component to reach the "level of the [AFDC] payment standard" under 45 C.F.R. § 248.3(c)(1)(ii), and thus the exempt income levels under NYSSL § 366(2)(a)(8) is a "flat granting" of shelter cost. The consolidation of various items of need into a single "flat grant", or the consolidation of the varying actual costs of single item of need into a "flat grant," as is the case herein with respect to adoption of the mean AFDC shelter cost, has been expressly endorsed by HEW. See Guidelines for the Development of Consolidated AFDC Assistance Standards, HEW 1974, hereinafter "HEW Guidelines" (A. 249, 252-257); Program Instruction APA-PI-74-17, HEW 1974, hereinafter "Program Instruction" (A. 246-248). The necessary result of "flat granting" the AFDC shelter component is that medical assistance recipients whose shelter cost exceeds the "mean" retain less exempt income than they would be paid if their shelter costs were in fact reimbursed under the individualized and variable AFDC shelter allowances since under that program they would receive the difference between the "mean" and local maximum. Equally, medical assistance recipients whose cost is less than the "mean" retain more under the flat grant than they would be paid as AFDC shelter allowances since they retain more than actual cost. That this is

so does not mean that the "flat granting" changes the content of the variable shelter allowance 'standard'. HEW Guidelines (A. 253-257); Program Instruction (A. 246). Nor does it mean, as the district court found, that the requirement of 45 C.F.R. § 248.3(c)(1)(ii) to establish exempt income levels at "the higher of the levels of payments standards" is violated because no medical assistance recipient can obtain the benefit of a shelter allowance maximum. See Point II, post.

B. Facts

Plaintiff Marion Aitchison's husband, George Aitchison, is a chronic care patient in a nursing home and has received medical assistance since October 1974 (A. 9).

Mrs. Aitchison lives in Rockland County, New York, with her two children Michael and Janice (A. 136). As of September 9, 1972, the Aitchisons (excluding George Aitchison*) were budgeted as a household of two (A. 133).** The exempt income

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* Persons in chronic care are not members of a family household for purposes of the exemption of current income. 18 NYCRR § 360.5(e).

** At the commencement of the action, the Aitchisons (excluding George Aitchison) were budgeted as a household of three (A. 133). Prior to the submission of the case, Michael Aitchison reached his majority, and the parties stipulated that a two person household (Mrs. Aitchison and Janice, her minor child) budget was appropriate (A. 133).

level for a family of two (effective July 1, 1975) is $3800, or $317 monthly, and is the highest SSI payment generally available for households of that size.

Mr. Aitchison's monthly income is $611.11 (A. 138), largely from a pension program and social security disability benefits (A. 134). Mrs. Aitchison's monthly income is $250.39, and Janice's monthly income is $118 (A. 138), largely from social security disability benefits (A. 134). Mrs. Aitchison's monthly income (with Janice's payment toward her own support) exceeds the $317 level, and she is required to pay the overage, $51.59 (A. 138), toward the cost of Mr. Aitchison's nursing home care. NYSSL § 366(2)(b); NYCRR § 360.7(a). Since Mrs. Aitchison does not require contribution from Mr. Aitchison to meet the exempt income level, Mr. Aitchison's income (less an allowance of $28.50 for personal needs) is paid toward the cost of his nursing home care. 18 NYCRR § 360.5(e).

Had Mrs. Aitchison sought and qualified of AFDC in Rockland County for herself and her minor child, she would have received a "two person" "flat grant" for basic needs of $150 monthly [NYSSL § 131-a(3)] plus a shelter allowance at actual cost up the Rockland County maximum of $220 monthly,

effective October 1, 1975 (A. 210).* Since the rent on the Aitchison apartment is $250 per month (A. 136), Mrs. Aitchison would have received the $220 maximum. Thus the difference between what Mrs. Aitchison and Janice would be paid if they were qualified AFDC recipients ($150 + 220 = $370) and what they may retain as dependents of a medical assistance recipient ($317) is approximately $53 a month. Of course, had Mrs. Aitchison and Janice qualified for AFDC, they would not be entitled to retain certain other exempt property allowed to medical assistance families. E.g., NYSSL § 366(2)(a), (1) homestead, (3) burial reserves of $500 per person or $2,000 per family, (4) savings.

C. Prior Proceedings

The complaint, as amended (A. 81), challenges the exempt income levels for medical assistance recipients set forth in NYSSL § 366(2)(a)(8) and related state regulations as applied to those recipients whose shelter cost exceeds the averaged shelter component used to establish the levels and who therefore retain less income under the medical assistance program than they would be paid if they qualified for AFDC where variable shelter allowances are available. (A. 9-12) Plaintiffs contend

* Notably, but for their income and resources, Mrs. Aitchison and Janice could have qualified for SSI, not AFDC, since Janice is not a dependent child under the AFDC program. 42 U.S.C. § 602 et seq. Under SSI, they would have received the same payment they are now credited with.

that the alleged discrepancy between the public assistance "standard" and the medical assistance "standard" set forth in NYSSL § 366(2)(a)(8) applied as described above denies them the equal protection of the laws and privileges and immunities of citizens of the United States (A. 12, 13). They contend further that NYSSL § 366(2)(a)(8) as so applied violates 42 U.S.C. § 1396a(a)(17) requiring "comparable standards" between PA-MA and MA-only groups (A. 12, 13) and the "payments standards" provisions of 45 C.F.R. § 248.3(c)(1) (A. 13, 81). Declaratory and injunctive relief was sought against the operation of the statute and regulations (A. 13-14). Jurisdiction was alleged under 28 U.S.C. §§ 1331 and 1343(3)(4) (A. 6). A three-judge court was requested on the constitutional issues (A. 9), and a class action order was sought (A. 7-9).

Plaintiffs' statutory claim of inconsistency between NYSSL § 366(2)(a)(8) as applied and 45 C.F.R. § 248.3(c)(1) was determined first by the single district judge [Hagans v. Lavine, 415 U.S. 528, 543-545 (1974); Taylor v. Lavine, 497 F. 2d 1208, 1214 (2d Cir. 1974)] on plaintiffs' motion for summary judgment

(A. 24-40) and on defendant Berger's motion for summary judgment dismissing the complaint for want of a substantial constitutional question and, in the alternative, for judgment in his favor on the statutory claim (A. 85-110).

Plaintiffs' motions for summary judgment on the statutory claim and for a class action order were granted (A. 264). The district judge found plaintiffs equal protection claim sufficiently substantial to vest the district court with subject matter jurisdiction under 28 U.S.C. § 1343(3) (A. 264). See Point I, post. The class was defined as "all applicants for and recipients of medical assistance only who [,] by reason of the application of New York Social Services Law § 366(2)(a)(8) and 18 NYCRR §§ 360.5(e) and 360.7(a)(5), retain less monthly exempt income than the standard of need for families of the same size, paying the same shelter cost (plus cost of fuel where applicable) and living in the same social services district who have qualified for categorical public assistance under the Aid to Families with Dependent Children Program" (A. 290-291).

The finding of inconsistency between NYSSL § 366(2)(a)(8) as applied and 45 C.F.R. § 248.3(c)(1) rests largely on the District Judge's belief that the averaging of the AFDC shelter component incorporated in the state statute creates a 'synthetic' and disadvantageous AFDC standard contrary to the terms of the federal regulation and that the regulation could be implemented just as efficiently by the importation of variable AFDC shelter allowances into the medical assistance program (A. 267-273). See Point II, post. The district court found further that its construction of 45 C.F.R. § 248.3(c)(1) was consistent with 42 U.S.C. §§ 1396a(a)(10)(C) and 1369a(a)(17), the statutory authority for the regulation (A. 274-275). See Point III, post.

On December 23, 1975, this Court granted a stay of the district court's Order and Judgment (A. 290-292) pending the disposition of this expedited appeal.

POINT I

THE USE OF AVERAGED SHELTER COST RATHER THAN VARIABLE AFDC SHELTER ALLOWANCES IN COMPUTING EXEMPT INCOME LEVELS UNDER THE MEDICAL ASSISTANCE PROGRAM DOES NOT PRESENT A SUBSTNATIAL EQUAL PROTECTION QUESTION WITH RESPECT TO THOSE MEDICAL ASSISTANCE RECIPIENTS WHOSE SHELTER COST EXCEEDS THE AVERAGE BUT WOULD HAVE BEEN REIMBURSED UNDER AFDC. MEDICAL ASSISTANCE RECIPIENTS AND AFDC RECIPIENTS ARE NOT SIMILARLY SITUATED, AND THERE IS NO CONSTITUTIONAL REQUIREMENT THAT THE SAME METHODOLOGY BE USED IN DETERMINING ELIGIBILITY AND BENEFIT LEVELS FOR DIFFERENT PUBLIC ASSISTANCE PROGRAMS.

A. The test of "substantiality."

Federal constitutional claims alleged in support of an action brought pursuant to either 28 U.S.C. § 1331 or § 1343(3) must be substantial in order to vest the district court with subject matter jurisdiction. California Water Service Co. v. City of Redding, 304 U.S. 252 (1938); Ex parte Poresky, 290 U.S. 30 (1933); Levering & Garrigues Co. v. Morrin, 289 U.S. 103, 105-107 (1933); Port Authority Bondholders Protective Committee v. Port of New York Authority, 387 F. 2d 259, 262 (2d Cir. 1967); Green v. Board of Elections, 380 F. 2d 445 (2d Cir. 1967), cert. den. 389 U.S. 1048 (1968); Boone v. Wyman, 295 F. Supp. 1143 (S.D.N.Y. 1969), affd. 412 F. 2d 857 (2d Cir. 1969), cert. den. 396 U.S. 1024 (1970).

A constitutional claim in insubstantial if either of two tests are met. It may be "obviously without merit" or "its unsoundness ... [may so clearly result] from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy." Hannis Distilling Co. v. City of Baltimore, 216 U.S. 285, 288 (1910); Ex parte Poresky, supra, at 32; California Water Service Co. v. City of Redding, supra at 255; Levering & Garrigues Co. v. Morrin, supra at 105-106; American Commuters Association v. Levitt, supra at 1150; Port Authority Bondholders Protective Committee v. Port of New York Authority, supra at 262.

Goosby v. Osser, 409 U.S. 512 (1973), did not limit findings of insubstantiality to the second of the two tests, i.e. those situations where prior decisions of the Supreme Court foreclose inquiry into the question presented. Reliance on the "prior decisions" test in that case resulted from the posture in which the case was presented, namely, on review of the Circuit Court's holding that the question presented had been foreclosed by the Supreme Court's earlier decision in McDonald v. Board of Election Commissioners, 394 U.S. 802 (1969). Indeed, Hannis Distilling Co., supra, Ex parte Poresky, supra and Levering & Garrigues Co., supra, which articulate the two test

approach, are cited with approval in Goosby, supra at 518. See Hagans v. Lavine, 415 U.S. 528, 536-538 (1974) also citing Hannis Distilling Co., supra; Ex parte Poresky, supra; and Levering & Garrigues Co., supra with approval.

In the case at bar, defendant contends that plaintiffs' equal protection claim is "obviously frivolous" or "wholly insubstantial" and thus places his principal reliance on the first of the tests discussed alone. However, the Court will note that certain of the cases cited have disposed of at least some of the components of plaintiffs' equal protection theories thus making the second ("prior decision") test arguably applicable. E.g. Jefferson v. Hackney, 486 U.S. 471 (1972); Fullington v. Shea, 320 F. Supp. 500 (D. Colo. 1970), aff'd. 404 U.S. 963 (1971); Dandridge v. Williams, 397 U.S. 471 (1970).

B. Plaintiffs' equal protection claim is insubstantial. AFDC recipients who also receive medical assistance (PA-MA) are not similarly situated with recipients of medical assistance only (MA-only), and there is no constitutional requirement that the same methodology be employed for both classes even assuming different benefit levels result.

Plaintiffs urged two equal protection theories: First, that the alleged discrepancy between the exempt income available to the MA-only recipients whose shelter cost exceed the AFDC average denies them equal protection of the laws when compared to PA-MA recipients whose shelter allowances may range

between the mean and the local maximum. (Complaint, A. 12; Plaintiffs' Memorandum in Support of Summary Judgment Motion, p. 10. Record on Appeal, Doc. No. 8); Second, that geographic disparities among recipients of medical assistance of themselves present a substantial question. (Plaintiffs' Memorandum in Support of Summary Judgment Motion, pp. 9-10).*

The second theory may be quickly put to rest. The "geographic disparities" to which plaintiffs refer are the shelter allowance maximums available to AFDC recipients which vary according to social services district (A. 210-213). The shelter allowances are not challenged in any regard in this action. Rather, it is the uniform (non-geographically diverse) NYSSL § 366 (2)(a)(8) exempt income levels for MA-only recipients which are placed in issue. As is apparent, plaintiffs' theory that mere geographic diversity is an appropriate predicate for an equal protection challenge would require them to challenge the diverse AFDC shelter allowances, not the uniform income exempt levels. Moreover, the purpose of the action and the effect of the decision below was to include the "diversity" represented by the shelter allowance and related local maximums (for those MA-only recipients whose shelter cost exceeded the AFDC "mean") in the computation of the exempt income levels with

* The district judge did not articulate any theory in support of his finding that a substantial equal protection question was presented (A. 264).

the evident purpose of making those levels constitutional, not unconstitutional.

Plaintiffs' alternative theory that the Equal Protection Clause is violated because the medical assistance exempt income levels (which average shelter costs to obtain uniform levels) may be lower than AFDC benefits (which allow a variable shelter cost up to local maximums) is no more "substantial".*

Medical assistance-only recipients are not similarly situated with PA-MA recipients. Obviously, the MA-only recipient is richer since, by definition, he cannot qualify for categorical assistance because of excess income and resources. 42 U.S.C. §§ 1396a(a)(10)(C), 1396(d)(a); 45 C.F.R. § 248.1(a). These differences are reflected in the federal medical assistance requirements which, in effect, provide two separate programs, one for the PA-MA category and one for the MA-only category. If a state participates in medical assistance, its plan must include the categorically eligible (PA-MA); it need not include the medically needy (MA-only). 42 U.S.C. §§ 1396a(a)(10)(A)(B)(C), 1396b(a). If the plan includes the

* For purposes of the argument in this Point only, defendant accepts the existence of a material discrepancy between exempt income levels based in part on averaged shelter cost and AFDC benefits based in part on actual shelter cost up to local maximums. See Point II, subpoint B.

medically needy [as New York's does, NYSSL § 366(1)], the assistance made available to that group need be "equal in amount, duration and scope" only within the (MA-only) group. It is not required that the assistance be equal between PA-MA and MA-only groups. Compare 42 U.S.C. § 1396a(a)(10)(A)(B) with § 1396a(a)(10)(C). Similarly, medically needy individuals are entitled to have their eligibility for assistance determined under standards "comparable" to, not identical with, those used to determine categorical eligibility. 42 U.S.C. § 1396a(a)(17).

The differences between the PA-MA category and the MA-only category are recognized as well in the state plan which generally provides that the MA-only recipient may retain more exempt income and resources than the public assistance recipient. See e.g. NYSSL § 104(1) public assistance recipients or persons liable for their support subject to actions to recover benefits paid within 10 years; no equivalent right against MA-only recipients; NYSSL § 366(2)(a)(1) allows homestead exemption with only limitation that it be "essential and appropriate to the needs of the household;" there is no parallel public assistance exemption, and if a public assistance recipient is permitted to keep his home, he must provide the local social services agency with a security interest in the property, NYSSL § 106(1); NYSSL § 366(2)(a)(4) allows MA-only recipients to retain, use and replenish savings equal to one-half of the income exemptions allowed; public assistance recipients

must apply resources to meet current needs, and no resource may be retained unless specifically exempted, e.g. 18 NYCRR §§ 353.16(a), 352.23(a); NYSSL § 366(2)(a)(3) allows MA-only recipients to obtain and retain more life insurance and burial reserves than public assistance recipients; Compare 18 NYCRR §§ 352.24, 352.26(b). Compare Schaak v. Schmidt, 344 F. Supp. 99, 102 (E.D. Wisc. 1971) (state plan denied $7500 "homestead" exemption to MA-only group but allowed it for PA-MA group).

Any doubt that the PA-MA recipient and MA-only recipient are not similarly situated was disposed of in Fullington v. Shea, 320 F. Supp. at 506. Therein, the Court rejected plaintiffs' claim that the exclusion of the medically needy from the Colorado state plan and the inclusion of the categorically eligible (PA-MA) denied them the equal protection of the laws. To adopt the theory of plaintiffs' herein that the PA-MA and MA-only groups are similarly situated would require the reversal of that holding.

Given the demonstrated differences between the PA and MA-only groups, the fact that a different methodology is applied to the former which may result in higher benefits in some cases cannot present a substantial equal protection question after

Jefferson v. Hackney, supra and Dandridge v. Williams, supra. In Jefferson, the Supreme Court sustained the Texas practice of applying a higher percentage reduction factor to AFDC than to other categorical assistance programs against an equal protection challenge. 406 U.S. at 549-551. If Texas may distinguish between dependent children and the "sick and elderly" (406 U.S. at 549) in terms of benefits paid notwithstanding both categories qualified under a uniform standard of need, surely the New York's distinction between medical assistance recipients who are categorically eligible and those who are not does not reach a constitutional dimension. Similarly, if Maryland may exclude a concededly eligible child from AFDC benefits although he is as needy as the other recipient members of his family without offending the Equal Protection Clause (Dandridge v. Williams, 397 U.S. at 484-487), New York may individualize the shelter cost of those in need of both public assistance and medical assistance and average the shelter cost of those in need of medical assistance only.

POINT II

THE USE OF AVERAGED SHELTER COST RATHER THAN VARIABLE AFDC SHELTER ALLOWANCES IN COMPUTING EXEMPT INCOME LEVELS UNDER THE MEDICAL ASSISTANCE PROGRAM CONFORMS WITH 45 C.F.R. § 248.3(C)(1) AND DOES NOT ESTABLISH A DIMINISHED AFDC 'PAYMENT STANDARD'.

A. The use of averaged shelter cost rather than variable AFDC shelter allowances in computing MA-only exempt income levels conforms with the express terms of 45 C.F.R. § 248.3(c)(1).

45 C.F.R. § 248.3(c)(1) sets forth certain limitations related to the determination of MA-only eligibility and consequently to the establishment of the exempt income levels for that group. 42 U.S.C. § 1396a(a)(17). See discussion pp. 14, ante. The regulation provides that the "levels of income" be expressed in "total dollar amounts" [subd. (c)(1)] at the "higher of the levels of the payments standards generally used as a measure of financial eligibility" on categorical assistance programs [subd. (c)(1)(ii)] (Emphasis added).* Higher....levels of payments standards" is further defined as "the level of the

* The term "higher" in subdivision (c)(1)(ii) refers to the basis for choosing between the available "payments standards" and does not require that either of the AFDC or SSI "payments standards" be maximized. See Jefferson v. Hackney, 406 U.S. 535, 539-545 (1972).

[AFDC] payment standard" for families of three or more [subd. (c)(1)(ii)(A)] and for individuals and families of two, as either the AFDC "payment standard" or the "highest [SSI] level of payment....generally available," whichever is higher [subd. (c)(1)(ii)(B)(1)(2)]. (Emphasis added.) Upon the adoption of the regulation in its present form, HEW noted that it required that" medically needy [income] levels must be uniform among individuals and families of similar size." 38 Fed. Reg. 9513 (March 11, 1974). See discussion p. 13, ante.

The New York MA-only "levels of income" are set forth in NYSSL § 366(2)(a)(8). For families of three or more, they consist of the NYSSL § 131-a(3) AFDC "flat grant" for basic needs for families of the same size and the average, or "mean," shelter cost paid by such families rounded to the nearest hundred. For individuals and families of two, the NYSSL § 366(2)(a)(8) income levels are the "highest [SSI] level of payment...generally available" since that "level of payment" is higher than the "level of the [AFDC] payment standard" computed as described above. See discussion pp. 15-17 ante. New York has always computed both MA-only exempt income levels and the "level of the [AFDC] payment standard" in this manner, and its state plan has been twice approved by HEW. See discussion pp. 17-18. Its methodology conforms in every respect with the requirements of § 248.3(c)(1).

The district court agreed that NYSSL § 366(2)(a)(8) levels complied with the first portion of § 248.3(c)(1) in that they set forth "levels of income....in total dollar amounts" (A. 266-267). The dispute thus focuses on whether the terms "levels of the payments standards generally used" in subdivision (c)(1)(ii), "level of the [AFDC] payment standard....generally applied" in (c)(1)(ii)(A) and "[AFDC] payment standard generally applied" in (c)(1)(ii)(B)(1) permit the use of the mean shelter cost paid by AFDC families or whether they require, as the district court found, the adoption the state's AFDC 'standard of need' including variable shelter allowances at cost up to local maximums for MA-only recipients whose shelter cost exceeds the AFDC mean. In defendant's view, the terms authorize, if they do not command, the adoption of mean rather than variable shelter cost.

Defendant notes initially that the terms are "level of [AFDC] payment standard" or "payments standards"* and are not otherwise defined. They are not to be confused with "standard of need," a word of art obviously well known to HEW and well within its ability to use if it so intended.

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* The plural "levels" and "payments standards" in (c)(1)(ii) refers to the choice between the AFDC level and the SSI level. It does not identify more than "level of the payment standard" with any categorical assistance program.

The use of the singular "level of the payment standard" with specific reference to the AFDC program [subdivisions (c)(1)(ii)(A) and (B)(1)] shows that one and only one AFDC "payment standard" "level" is intended for each family size. Defendants have obtained that "level" by averaging the practically infinite variety of shelter costs payments (ranging from $0 to the 58 maximums of the social services districts).

The obligation to obtain a single "level" for each family size as the AFDC "payment standard" under § 248.3(c)(1) is further evidenced by the choice between the AFDC "payment standard" and the "highest [SSI] level payment" required for individuals and families of two under subdivision (ii)(B)(1) and (2). This choice is obviously intended to be made once for all cases within the class so that the eligibility level may be known in advance rather than shifting between the AFDC and SSI levels depending on the shelter cost alleged by each applicant for assistance.

Defendant's interpretation of "level of [AFDC] payment standard" and similar terms is also consistent with the regulatory history requiring that "medically needy [income] levels must be uniform among individuals and families of similar size." 38 Fed. Reg. 9513 (March 11, 1974). (Emphasis added.)

In contrast, the district court's construction of the regulation which would preclude shelter cost averaging and require the adoption of the AFDC 'standard of need' (for those MA-only recipients whose shelter cost exceeds the AFDC mean) opposes the plain meaning of the language and the regulatory history as well.

It is apparent that the adoption of the AFDC 'standard of need' must produce different (as opposed to "uniform") exempt incomes (as opposed to "levels") in every case it is applied both within a given family size* and across family sizes.** This is so because crediting shelter cost for the MA-only group as if they were AFDC recipients brings with it the full range of actual (as opposed to average) shelter cost from $0 to the 58 local maximums. One result is exempt incomes expressed in varying (as opposed to "total") "dollar amounts". Although the district court attempted at some length to accommodate

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* The only situation in which this would not occur is the crediting of more than one recipient's shelter cost at the same maximum.

** The range required by the district court is from the mean to the maximums because only those MA-only recipients whose costs exceeded the AFDC average were considered to be aggrieved. However, the court correctly recognized that the same computational method would have to be applied to all MA-only recipients with the result that MA-only recipients whose shelter cost was less than the AFDC average would also be individually computed, adding the bottom half ($0-mean) of the range (A. 276-277).

the requirement of "total dollar amounts" with varying dollar amounts (A. 269-270), it was clearly in error. Contrary to the district court's suggestion, one cannot fairly read "total dollars amounts" as "merely call[ing] for an objective, efficient standard for determining eligibility" (A. 270) or as allowing any computational method which will reduce itself to "flat dollar amounts" (id.). Nor should the term be confused with "money amounts" in 45 C.F.R. § 233.20(a)(2) pertaining to the AFDC standard of eligibility (A. 270, 238 n. 31). "Money amounts" encompasses any computational method which can be expressed in "dollars" and allows for varying individual results. Expressed "total dollar amounts" are fixed, and must precede individual determinations of eligibility because they are the dividing line between eligibility and ineligibility. In no event can the district court's construction be reconciled with the previously noted regulatory history requiring that MA-only exempt income levels be "uniform" within family sizes. 38 Fed. Reg. 9513 (March 11, 1974).

In addition, the use of the AFDC 'standard of need' does not result in a "level of the [AFDC] payment standard.... generally applied" given the varying amounts produced by the AFDC" standard; there is no single "level" for a given family size; and no "standard" "generally applied" within the accepted sense of those terms.

The fact that § 248.3(c)(1) and the AFDC 'standard of need' both use the word "standard" does not require that the same meaning attach in both cases. Defendant construes the term "standard" in the federal regulation in accordance with its ordinary meaning, i.e., as a single measure, criterion or test. Websters International Dictionary, p. 2455, ¶ 5 (2d ed. 1949). The term "standard" in AFDC 'standard of need' has a unique meaning determined from the context of NYSSL § 131-a and related provisions. Essentially the term means an averaged "flat grant" for basic needs, plainly within the ordinary meaning of "standard," plus individualized allowances for certain needs including shelter, plainly not within the ordinary meaning of "standard," The district court recognized the unique meaning of 'standard of need' when it characterized it as "partially variable" (A. 268) and "a composite need formula" (A. 269). This Court has also recognized that unique meaning. In describing the AFDC program formerly in force in Connecticut which was similar to the present New York program, this

Court stated in Johnson v. White, ____F. 2d____(Doc. No. 75-7153, November 28, 1975, Slip Op. No. 147, at p. 771 (per Friendly, C.J.):

> "the State of Connecticut computed its 'standard of need' by determining a separate budget of each AFDC-assistance unit; while this budget included certain standardized sums for the basic needs of food, clothing, personal incidentals and household supplies, the sums for shelter, utilities, and various 'special needs' were included either at actual cost to the recipient unit or at cost limited by a stated maximum [i.e. they were not standardized]." (Emphasis added. Internal quotes original.)

Given fact that § 248.3(c)(1) eschews use of the term 'standard of need' and the acknowledged unique meaning of that term, there is no basis for defining "level of the [AFDC] payment standard" as the AFDC 'standard of need'.

The district court correctly stated that § 248.3(c)(1) was intended in part to provide an efficient method for determining MA-only eligibility and exempt income levels (A. 269, 282 n. 27, 284-285 n. 40). However, the district court's

requirement that the AFDC's 'standard of need' including shelter allowances be adopted instead of the average of that cost opposes this principle. First, the use of shelter allowances requires the investigation of the cost of shelter in every case, an investigation now avoided by averaging. Second and more importantly, it disables the a priori choice between the AFDC "level" and the SSI "level" which is both required by the terms of subdivision (c)(1)(ii)(B) and necessary to its efficient operation. As construed by the district court, the choice between the AFDC and SSI level would be contingent upon the shelter cost in each case. If the SSI level was higher than the AFDC "flat grant" plus averaged shelter cost, or plus actual shelter cost or local maximum, the SSI level would be selected. If the AFDC "flat grant" plus actual shelter cost or local maximum was higher than the SSI level, it would be selected. Plainly, these complicated computational procedures would not effectuate the purpose of the medical assistance program to determine eligibility "in a manner consistent with simplicity of administration" (A. 284-285 n. 40).

B. The use of averaged shelter cost in computing MA-only exempt income levels does not diminish the AFDC 'standard of need.'

The district court's view that § 248.3(c)(1) requires the adoption of the shelter allowance methodology used to determine the AFDC 'standard of need' rests in large measure on the erroneous belief that the average, or "flat granting," of AFDC shelter cost to reach the NYSSL § 366(2)(a)(8) levels creates a materially different and diminished 'standard of need' (A. 267-273).

While it is true that the "flat grantng" of AFDC shelter costs necessarily results in the "averaging away" of a practically infinite variety of shelter allowance payments (See HEW Guidelines, A. 252), it does not follow that such averaging diminishes or changes the content of the former 'standard' in any way. HEW Guidelines, A. 254-257; Program Instruction, A. 246. Rosado v. Wyman, 397 U.S. 397, 419-420 (1970). In fact and law, there is no material or cognizable difference between the two since the "flat grant" is the fair average of the former 'standard'. Thus in the case at bar, while no MA-only recipient can obtain credit for a shelter allowance maximum neither can he be "debited" with a "minimum."

He receives credit for the AFDC "fair average" and cannot be characterized as living below subsistence because he does not receive credit in excess of the average.

The ready convertability of variable 'standards' into "flat grants" has been specifically recognized by HEW and the later endorsed as an 'unchanged' statement of the former 'standard' given the use of appropriate averaging techniques (A. 252-257). Indeed, acceptance of plaintiffs' theory that "flat granting" means a 'loss' to recipients, or a 'lower' standard, would require a finding that HEW was attempting to reduce public assistance benefits by aiding the conversion from variable to averaged plans.

Any doubt that defendant's view is correct was resolved by this Court's recent decision in Johnson v. White, supra, which generally approved Connecticut's conversion from a partly averaged, partly variable AFDC plan to a single flat grant for almost all needs (subject to some further evidentiary findings on remand). The Court stated (relying on Rosado): "[I]f a state had previously 'established' a standard of need fully conforming to the Constitution, the requirements of the Social Security Act, and HEW's regulations thereunder, and then adjusted the figures...[to conform with 42 U.S.C. § 602(a)(23), its conversion to a "flat grant"] would be immune from successful

attack" (Slip. op. pp. 778-779. See also Rosado v. Wyman, supra at 419 stating: "Providing all factors in the old equation ['standard of need'] are accounted for and fairly priced and providing the consolidation on a statistical basis reflects a fair averaging, a State may, of course, consistently with [§ 602(a)(23)] redefine its method for determining need." Johnson v. White, acknowledges that the Rosado formulation applies to shelter needs and finds that the potentially "harsh effect" on those "for whom the averaged sum was lower than the previously determined budget," the very argument made herein against the NYSSL § 366(2)(a)(8) levels as applied, does not prevent averaging. Slip op. p. 782.

POINT III

ASSUMING ARGUENDO THAT 45 C.F.R. § 248.3(c)(1) IS CONSTRUED TO REQUIRE THE USE OF VARIABLE AFDC SHELTER ALLOWANCES RATHER THAN AVERAGED SHELTER COST TO DETERMINE EXEMPT INCOME LEVELS FOR RECIPIENTS OF MEDICAL ASSISTANCE ONLY, THE REGULATION VIOLATES FEDERAL STATUTES REQUIRING ONLY REASONABLE STANDARDS FOR DETERMINING ELIGIBILITY AND COMPARABILITY, NOT IDENTITY, BETWEEN RECIPIENTS OF SUCH ASSISTANCE AND RECIPIENTS OF BOTH PUBLIC ASSISTANCE AND MEDICAL ASSISTANCE.

42 U.S.C. § 1396a(a)(17) requires that the state plan incorporate "reasonable" and necessarily ascertainable and efficient standards for determining medical assistance eligibility which are comparable between MA-only and PA-MA groups. As demonstrated at pp. 36-40, the adoption of variable shelter allowances to determine such eligibility (and exempt income levels) does not create a reasonable, ascertainable or efficient standard. Moreover, the use of the terms "reasonable" and "comparable" "standards" admit of more than one such standard and do not require identical standards between the MA-only and PA-MA groups. Certainly no single methodological requirement is imposed. The district court's construction of § 248.3(c)(1) allows of only one standard and one methodology, the State's AFDC 'standard of need.'

42 U.S.C. § 1396a(a)(10) elaborates further on the comparability requirements. All PA-MA recipients must receive medical assistance equal "in amount, duration and scope" to that received by any other PA-MA recipient [subd. (A)(B)(i)] and no less than that recevied by MA-only recipients [subd. (B)(ii).] All MA-only recipients must receive medical assistance "equal in amount, duration and scope" within their own group [subd. (C)(i)(ii)]. See also 42 U.S.C. § 1396d(a). Section 248.3(c)(1) as construed by the district court makes the assistance available to the PA-MA and MA-only groups "equal" and is therefore plainly unauthorized by the federal statutory plan.

CONCLUSION

FOR THE FOREGOING REASONS, THE ORDER AND JUDGMENT BELOW SHOULD BE REVERSED AND THE ACTION DISMISSED. ALTERNATIVELY, THE CAUSE SHOULD BE REMANDED FOR TRIAL OF THE ACCURACY OF DEFENDANT'S FAIR AVERAGING TECHNIQUES AND DISPOSITION ON THE MERITS OF ANY CONSTITUTIONAL CLAIMS.

Dated: New York, New York
January 9, 1976

Respectfully submitted,

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MARY KO , being duly sworn, deposes and says that She is employed in the office of the Attorney General of the State of New York, attorney for Defendant-Appellant herein. On the 9th day of January , 1976 , She served the annexed upon the following named persons :

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Attorneys in the within entitled action by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorneys at the addresses within the State designated by them for that purpose.

Mary Ko

Sworn to before me this
9th day of January , 1976

Assistant Attorney General
of the State of New York